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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SCOTT KINGSTON,

11 Plaintiff,

12 v.

13 INTERNATIONAL BUSINESS
14 MACHINES CORPORATION,

15 Defendant.

CASE NO. C19-1488 MJP

ORDER ON DISCOVERY
MOTIONS

16 This matter comes before the Court on Plaintiff's Motion for Relief from Deadline and
17 Motion Exclude Expert Testimony (Dkt. No. 40) and Plaintiff's Motion for Relief from Deadline
18 and Motion to Compel (Dkt. No. 42). Having reviewed the Motions, the Oppositions (Dkt. Nos.
19 44 and 45), Replies (Dkt. Nos. 46 and 47), and all supporting papers, the Court: (1) GRANTS the
20 Motion to Exclude Expert Testimony; and (2) RESERVES RULING on the Motion to Compel
21 pending in camera review of the disputed settlement agreement.
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BACKGROUND

Plaintiff Scott Kingston brings retaliation, age discrimination, wage withholding, breach of contract, and related claims against his former employer, International Business Machines Incorporated (IBM).

As relates to the Motion to Compel, Kingston alleges that IBM retaliated against him for complaining about the discriminatory treatment by IBM against an African American employee under his management, Jerome Beard. Kingston alleges that he complained about IBM's decision to cap a commission due to Beard for a large sale, while IBM allowed a white employee, "Nick," to receive a full, uncapped commission for a similarly large sale. Beard filed suit against IBM purportedly alleging similar claims to Beard based largely on the same facts. Beard settled his suit against IBM, and Kingston now seeks a complete, unredacted copy of the, settlement agreement. IBM has agreed to provide a copy of the settlement agreement for "attorneys' eyes only" with the amount of the settlement redacted.

As relates to the Motion to Exclude, Kingston seeks exclusion of William Skilling's expert report on Kingston's efforts to mitigate his damages. IBM served this report as a rebuttal to the expert damages prepared for Kingston by Erick West. In his opening report, West touched on the issue of mitigation, but primarily to note that his damages calculations "assumed no past or future mitigation employment for Mr. Kingston." (Dkt. No. 41 at 9.) Skilling provided a 25-page report detailing his opinion as to Kingston's efforts and ability to mitigate his damages by finding alternative employment. (Dkt. No. 41 at 25-50.)

ANALYSIS

A. Motion to Exclude

Kingston seeks an order excluding the report of William Skilling on the theory that it was an untimely-disclosed expert report that IBM tries to masquerade as a rebuttal report. The Court agrees.

Under Rule 26(a)(2)(D)(ii), a party may serve a rebuttal expert report “solely to contradict or rebut evidence on the same subject matter identified by another party.” Rebuttal reports must be tailored to respond directly to the subject matter of the opinions offered by the opening expert’s report. See, e.g., Rodriguez v. Walt Disney Parks & Resorts U.S., Inc., 2018 WL 3532906, at *2 (C.D. Cal. July 2, 2018).

In his “rebuttal” report, Skilling provides a wide-ranging opinion on Kingston’s ability and efforts to find employment. (Dkt. No. 41 at 25-50.) This opinion does not rebut any opinion offered by Kingston’s expert, Erick West. On the topic of mitigation, West merely identified mitigation as an issue on which he assumed Kingston was not and would not be employed. He provided no opinion on whether Kingston could find employment. Skilling’s report thus does not rebut West’s opinion, and West’s report did not open the door for Skilling’s report.

The Court finds exclusion of Skilling’s report proper. Skilling’s opinions go to IBM’s mitigation affirmative defense that forms part of its case-in-chief. See Burnside v. Simpson Paper Co., 66 Wn. App. 510, 529 (1992), aff’d, 123 Wn.2d 93 (1994). The report should have been disclosed as an opening report, not as a rebuttal. See Fed. R. Civ. P. 26(a)(2)(D); Dkt. No. 29. While IBM offers Kingston the chance to retain an expert and depose Skilling, Kingston convincingly argues that the late disclosure of Skilling would still be prejudicial. Kingston would be forced to retain a mitigation expert on a short time frame and conduct expert discovery while

1 in the middle of briefing his opposition to IBM's pending motion for summary judgment and
 2 preparing for trial. The Court finds IBM's failure to timely disclose Skilling's report was not
 3 harmless or substantially justified, and that exclusion of the report is proper under Rule 37(c)(1).
 4 The Court GRANTS the Motion to Exclude.

5 The Court notes that IBM does not contest Kingston's request to permit consideration of
 6 the Motion after the deadline passed for discovery motions. The Court finds good cause to permit
 7 this late filing. See Fed. R. Civ. P. 16(b).

8 **B. Motion to Compel**

9 **1. The Motion is Timely**

10 Invoking Rule 16(b), Kingston asks to be excused from failing to file his Motion to
 11 Compel before the discovery motion deadline lapsed. "Rule 16(b)'s 'good cause' standard
 12 primarily considers the diligence of the party seeking the amendment." Johnson v. Mammoth
 13 Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). The Court may extend the deadline if the
 14 moving party shows that it could not reasonably meet the deadline despite its diligence. Id.

15 Kingston has demonstrated reasonable diligence in pursuing this discovery. Kingston
 16 served his discovery request for the settlement agreement the day before the discovery motion
 17 deadline and received IBM's response the day before discovery was to close. (See Dkt. No. 29;
 18 Declaration of Toby Marshall ISO Motion to Compel ¶¶ 3-4 (Dkt. No. 43).) Kingston promptly
 19 met and conferred and filed the Motion six days after the close of discovery. IBM argues that
 20 Kingston's counsel was aware of the settlement agreement earlier and failed to request it before
 21 the close of discovery. But while Kingston may have been able to demand this document earlier,
 22 the Court does not find this demonstrates a lack of diligence. The Court notes that Kingston
 23 served the discovery request with sufficient time to permit a response and moved quickly to file
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